

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

CITY OF OAK HARBOR,

Case No. 10-2-0017

Petitioner,

v.

**ORDER FINDING
COMPLIANCE – FAILURE TO ACT**

ISLAND COUNTY,

Respondent.

This Matter comes to the Board following a Compliance Report filed by Island County on May 9, 2011. The City filed Objections to a Finding of Compliance along with a Motion to Consolidate Compliance Action with New Petition for Review on May 31, 2011. A telephonic compliance hearing was held on June 21, 2011. Daniel B. Mitchell appeared on behalf of Island County. Margery Hite appeared on behalf of Petitioner, City of Oak Harbor. Board members James McNamara, William Roehl and Nina Carter were present with Ms. Carter presiding.

I. PROCEDURAL HISTORY

On November 16, 2010, the City of Oak Harbor (City) filed a Petition for Review (PFR) alleging a failure of Island County (County) to act to review and revise urban growth areas and densities by September 28, 2008, as required by RCW 36.70A.130 (3) (a) and (b).

On December 3, 2010, the County filed a Dispositive Motion to Dismiss. On December 10, 2010, the City filed a Response to the County's motion which included a Counter Motion for Final Decision and Order on Limited Record. Following the Prehearing Conference on December 17, 2010 which included argument on the motions, the Board, on December 20,

1 2010, issued an Order Finding Non-Compliance – Failure to Act and set a schedule for
2 compliance.

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4 On May 9, 2011 the County submitted its Compliance Report-Statement of Actions taken in
5 response to the Board's Order. On May 31, 2011 the City of Oak Harbor filed Objections to
6 a Finding of Compliance together with a Motion to Consolidate Compliance Action with New
7 Petition for Review. The new PFR (Case No. 11-2-0005) challenges the compliance action
8 taken by the County: adoption of Ordinance C-46-11 (Amending the Comprehensive Plan to
9 Address Update to Population Projections and Urban Growth Boundaries) and C-38-11
10 (Amending Map #219 of the Official Zoning Atlas for Island County to Show the Revised
11 Oak Harbor Urban Growth Areas Boundary to Implement CPA 155/04). On June 8, 2011,
12 the County filed its Response to Objections.
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14 15 II. BURDEN OF PROOF

16 Following a finding of non-compliance, the local jurisdiction is given a period of time to adopt
17 legislation to achieve compliance.¹ After the period for compliance has expired, the Board is
18 required to hold a hearing to determine whether the local jurisdiction has achieved
19 compliance.² For purposes of Board review of the comprehensive plans and development
20 regulations adopted by local governments in response to a non-compliance finding, the
21 presumption of validity applies and the burden is on the challenger to establish the new
22 adoption is clearly erroneous.³
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25 In order to find the County's compliance action clearly erroneous, the Board must be "left
26 with the firm and definite conviction that a mistake has been made".⁴ Within the framework
27 of state goals and requirements, the Board must grant deference to local governments in
28 how they plan for growth:
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32 ¹ RCW 36.70A.300(3)(b)

² RCW 36.70A.330(1) and (2)

³ RCW 36.70A.320(1), (2) and (3)

⁴ *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)

1 The legislature intends that the board applies a more deferential standard of
2 review to actions of counties and cities than the preponderance of the evidence
3 standard provided for under existing law. . . Local comprehensive plans and
4 development regulations require counties and cities to balance priorities and
5 options for action in full consideration of local circumstances. The legislature
6 finds that while this chapter requires local planning to take place within a
7 framework of state goals and requirements, the ultimate burden and
8 responsibility for planning, harmonizing the planning goals of this chapter, and
9 implementing a county's or city's future rests with that community.⁵

10 III. ANALYSIS AND DISCUSSION

11 • Issue to be discussed

12 *Whether Island County's compliance action in response to the Board's Order Finding Non-*
13 *Compliance-Failure to Act appropriately addresses violations of RCW 36.70A.130(3)(a) and*
14 *(b)?*

15 Positions of the Parties:

16 The Board's Order Finding Non-Compliance – Failure to Act determined Island County had
17 failed to review and revise its urban growth areas and densities by September 28, 2008 as
18 required by RCW 36.70A.130(3)(a) and (b). The County states it has achieved compliance
19 with its adoption of Ordinances C-46-11 and C-38-11 which is the County's final legislative
20 action completing the 2005 county-wide population projection and UGA boundary review.
21 Ordinance C-46-11 contains the County's Comprehensive Plan text amendments and
22 amendments to the future land use map. Ordinance C-38-11 includes the amendment to
23 the Island County Zoning Atlas so as to reflect the amendments adopted in Ordinance C-46-
24 11 that expand the Oak Harbor UGA.⁶ The City of Oak Harbor filed what it described as
25 facial objections and declared the City would file another Petition for Review challenging the
26 County's adoption of Ordinances C-46-11 and C-38-11. The City requested the compliance
27 action in this case (No.10-2-0017) be consolidated with its new PFR. The City's stated
28 objections are (1) the failure to address the population projections for the "succeeding 20
29 year period"; (2) the failure to include the County's designated Non-Municipal UGA in its
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⁵ RCW 36.70A.3201, in part

⁶ Island County Compliance Report, at 2.
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1 review of urban growth and densities; (3) the failure to provide for public participation in the
2 update; and (4) the failure to coordinate with the City.

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4 The County asks the Board to deny the City's motion to consolidate as the objections are
5 substantive. The County contends it took action and thus complied with the Board's Order.
6 Any new challenges to the action taken by the County must be filed through a new PFR.⁷
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8 Board Analysis:

9 The Board's December 20, 2010 Order found the County had failed to review and revise its
10 urban growth areas and densities by the date required. The County has now acted to
11 address those matters.
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13 The fact the City does not agree with the substance of the County's actions is not at issue in
14 this case. The issues listed by the City as non-GMA compliant (the failure to address the
15 population projections; failure to include the County's designated Non-Municipal UGA in its
16 review of urban growth and densities; failure to provide for public participation; and failure to
17 coordinate with the City) are substantive and warrant a full discussion and review by the
18 Board in a new appeal. The Board notes the City of Oak Harbor has indeed filed a new
19 PFR (Case No. 11-2-0005) complaining of the same issues in their Objections to a Finding
20 of Compliance and its substantive objections will be addressed in that proceeding. As the
21 Board stated in *Petree, et al. v. Whatcom County*: "... when non-compliance is based on a
22 failure to act, compliance is cured when the necessary "procedural" action is complete. Any
23 objection to the "substance" of that action requires a new Petition for Review."⁸ Thus, the
24 Board concludes the County took action to comply with RCW 36.70A.130(3)(a) and (b), as
25 required by the Board's December 17, 2011 Order.
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⁷ Island County's Response to City's Objections at 2


⁸ Case No. 08-2-0021c, Order on Motion, at 3 (Feb. 1, 2010)

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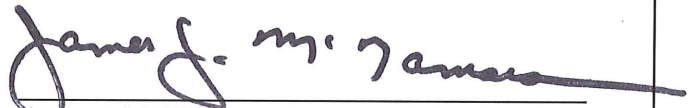
IV. ORDER

Based upon the foregoing, the Board DENIES the City's objections to a finding of compliance, DENIES the City's motion to consolidate the compliance action with a new PFR and accepts Island County's compliance report. The Board now finds the County in compliance with the Board's Order and with the Growth Management Act. This case is CLOSED.

DATED this 12th day of July, 2011.



Nina Carter, Board Member



James McNamara, Board Member



William P. Roehl, Board Member

Note: The parties are reminded that the Board is now a section of the Environmental and Land Use Hearings Office – ELUHO – with a new e-mail address western@eluho.wa.gov. The Board's Rules of Practice and Procedure have been updated effective July 21, 2011, and are now found at Chapter 242-03 WAC.

Pursuant to RCW 36.70A.300 this is a final order of the Board.⁹

⁹ Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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